

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-000778-MR

THOMAS A. CROW¹

APPELLANT

v. APPEAL FROM LEWIS CIRCUIT COURT
HONORABLE ROBERT B. CONLEY, JUDGE
ACTION NO. 17-CR-00029

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND LAMBERT, JUDGES.

LAMBERT, JUDGE: A Lewis County jury found the Appellant, Thomas Crow, guilty of first-degree trafficking in controlled substances² and of being a first-

¹ The Appellant is named as Thomas A. Crowe in the notice of appeal. However, the Appellant later filed a motion with this Court to correct the spelling from “Crowe” to “Crow.” This motion was granted.

² A Class C felony.

degree persistent felony offender (PFO).³ For these crimes, the jury recommended a sentence of fifteen years' imprisonment. On April 17, 2019, the Lewis Circuit Court entered judgment and imposed sentencing following the jury's recommendation. Crow now appeals this judgment as a matter of right. After careful review of the record, we affirm.

On May 18, 2017, officers from the Vanceburg Police Department organized a controlled drug purchase from Crow using a confidential informant (CI). The CI was searched then given \$300.00 in marked cash to purchase the drugs. He was also wired with a device that captured a video recording of the transaction and allowed officers to listen in real time. Additional details of the drug deal are irrelevant to the issues presented on appeal. It is sufficient to say the drug deal took place and the transaction was recorded on video. Later that evening, officers arrived at Crow's residence and arrested him. While at the residence, officers asked Crow's mother for permission to search the house. She allowed them to search his bedroom, and even led officers to where Crow hid the majority of the marked cash.⁴

Crow's jury trial was two days and was bifurcated into a guilt phase and a penalty phase. Day one consisted wholly of the guilt phase, *i.e.*, determining

³ A sentence enhancer.

⁴ All but \$20.00 of the \$300.00 was recovered.

Crow's guilt or innocence on the trafficking charge. At the close of the Commonwealth's case the jury was dismissed, then Crow made an oral motion for directed verdict, solely on the trafficking charge, which was denied. Crow opted not to put any evidence on record in his defense. Next, the circuit court addressed the jury instructions, the PFO charge, and sentencing with the Commonwealth and Crow's defense counsel. There were no objections to the jury instructions and, at this time, the circuit court specifically asked the parties if they were going to "do the PFO charge and sentencing together." The Commonwealth answered yes, and defense counsel offered no objection.

The second day of trial began with instructions to the jury on Crow's trafficking charge. After deliberation, the jury returned a guilty verdict. The circuit court then informed the jury it would be moving into phase two of the trial which consisted of the PFO charge and sentencing. Once the judge read the PFO indictment to the jury, the Commonwealth was permitted to present its case. The only witness called during phase two of the trial was Officer Tyler Brewer. As a general matter, he testified about Kentucky's penalty class system and penalty range, the class and range of the trafficking charge Crow had just been convicted of, the effect of a PFO charge, "good time credits," and Crow's prior felony convictions. More specifically, the testimony at issue on appeal is as follows.

Commonwealth: In addition to enhancing the range of penalties, does the conviction as a first-degree persistent felony offender also affect parole eligibility?

Brewer: Yes ma'am, it does. A PFO one carries what we call a flat ten years which means the Defendant will have to serve a flat ten years in prison before he is eligible for parole. However, that being said, the person could become parole eligible while serving that time.

...

Commonwealth: So, is it possible for someone who is convicted on a Class C felony PFO one, persistent felony offender first degree, who receives a ten-year sentence, they're not eligible to see the parole board in ten years, but is it possible for them to actually serve their prison term out prior to that ten-year date that they would see the parole board?

Brewer: Yes ma'am, that is correct.

...

Commonwealth: Could they in fact reduce their term by as much as a year?

Brewer: Yes ma'am, absolutely.

Commonwealth: As much as two years?

Brewer: If they chose to do so. It's strictly voluntarily there's nothing, unless the parole board feels someone needs to do a substance abuse class or a GED, there's nothing saying they have to do them unless the parole board orders them to do so.

Video Record at 11:14:00-11:16:57, March 12, 2019.

At the conclusion of Officer Brewer's testimony, the Commonwealth rested. Crow again chose not to put any evidence on record in his defense. Additionally, Crow failed to make a second motion for directed verdict on the PFO charge. Next, the jury was instructed on the PFO charge and sentencing, then the parties gave closing arguments. Crow emphasized that his trafficking charge was minor and requested the jury give him the minimum sentence so he might be able to utilize "good time credit" and serve out his sentence early. The Commonwealth attempted to point out that Crow was "in the business of selling drugs" and requested the maximum sentence. After deliberation, the jury returned a guilty verdict on the PFO charge and recommended a sentence of fifteen years' imprisonment.

Subsequently, Crow tendered a motion for judgment notwithstanding the verdict (JNOV) pursuant to RCr⁵ 10.24 and a motion for a new trial pursuant to RCr 10.06. Crow appeared before the circuit court on April 17, 2019, for sentencing. At this time, both motions were orally denied by the court and judgment was entered the same day. This appeal followed.

Crow raises two unpreserved issues on appeal and requests we review said issues for palpable error under RCr 10.26.

Under Criminal Rule 10.26, an unpreserved error may only be corrected on appeal if the error is both

⁵ Kentucky Rule of Criminal Procedure.

“palpable” and “affects the substantial rights of a party” to such a degree that it can be determined “manifest injustice resulted from the error.” For error to be palpable, “it must be easily perceptible, plain, obvious and readily noticeable.” *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006). The rule’s requirement of manifest injustice requires “showing . . . [a] probability of a different result or error so fundamental as to threaten a defendant’s entitlement to due process of law.” *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006). Or, as stated elsewhere in that decision, a palpable error is where “the defect in the proceeding was shocking or jurisprudentially intolerable.” *Id.* at 4. Ultimately, “[m]anifest injustice is found if the error seriously affected the fairness, integrity, or public reputation of the proceeding.” *Kingrey v. Commonwealth*, 396 S.W.3d 824, 831 (Ky. 2013) (quoting *McGuire v. Commonwealth*, 368 S.W.3d 100, 112 (Ky. 2012)).

Wise v. Commonwealth, 422 S.W.3d 262, 276 (Ky. 2013).

First, Crow argues Officer Brewer’s testimony regarding “good time credits” was inaccurate and is thereby a violation of his due process rights. In support of his argument, he cites to the Kentucky Supreme Court’s decision in *Robinson v. Commonwealth*. At issue in *Robinson* was whether the officer’s “incorrect, or false testimony, during the sentencing phase regarding the application of ‘good time credits’ on the actual amount of time [Robinson] would be required to serve,” was palpable error. 181 S.W.3d 30, 37-38 (Ky. 2005).

The Court determined “[t]he use of incorrect, or false, testimony by the prosecution is a violation of due process when the testimony is material.” *Id.* at 38 (citing *Napue v. Illinois*, 360 U.S. 264, 269, 272, 79 S. Ct. 1173, 3 L. Ed. 2d

1217 (1959)). In reaching its decision regarding whether the testimony was material, the Court considered (1) the sentence given, (2) who elicited the testimony and when, and (3) whether the Commonwealth emphasized the incorrect or false testimony. *Id.*

The inaccurate testimony at issue in *Robinson* was elicited by the Commonwealth during the sentencing phase of trial. *Id.* The Commonwealth then chose to emphasize the inaccurate testimony later in its closing argument. *Id.* Ultimately, the jury in *Robinson* recommended consecutive sentences on his three felony charges totaling thirty years' imprisonment, which was the statutory maximum. *Id.* As a result, the Court determined the officer's testimony was material because it probably "influenced the jury to render a" greater sentence. *Id.* Therefore, the matter was reversed and remanded for a new penalty phase of the trial.

We are not so convinced the same is true of the case *sub judice*. Officer Brewer correctly testified Crow would have to serve a flat ten-year sentence before becoming eligible for parole; however, he then qualified his testimony by saying "the person could become parole eligible while serving that time." This statement is incorrect. As noted in *Robinson*, "the prisoner does not actually receive credit for his good time until he reaches the minimum parole eligibility[.]" *Id.*

However, unlike in *Robinson*, it appears the Commonwealth attempted to clarify Officer Brewer's testimony as applying to sentencing calculations instead of parole eligibility. In a follow-up question, the Commonwealth noted, and Officer Brewer agreed, Crow would serve ten years before becoming parole eligible, but he could potentially "serve out" his sentence before becoming parole eligible. Neither the Commonwealth nor Officer Brewer attempted to explain what they meant by "serve out" and defense counsel did not seek any further clarification on cross-examination. Moreover, defense counsel did not object to any of Officer Brewer's testimony.

Regardless, the Commonwealth did not discuss "good time credit," parole eligibility, or "serve out" dates in its closing argument. Crow, however, did by specifically requesting the jury give him the minimum sentence, so he could earn "good time credit" and reduce his sentence. If convicted of the PFO charge, Crow would face ten to twenty years' imprisonment. The jury recommended a midline sentence of fifteen years' imprisonment.

Based upon the above facts, we are unconvinced the officer's testimony was material to the jury's decision. Certainly, the Commonwealth's questioning and Officer Brewer's testimony was inartful and not entirely correct at times, but Crow attempted to use this "good time credit" testimony in his favor. The jury recommended the midlevel sentence. We cannot speculate as to whether

the testimony swayed the jury in the direction of a lower or greater sentence. As a result, Crow's due process rights were not violated and thus there is no manifest injustice. Therefore, we deduce no palpable error. *Wise*, 422 S.W.3d at 276.

Crow's second argument on appeal is that the circuit court erred in failing to order a directed verdict in his favor as to the PFO charge. We must first note Crow did not make a motion below for directed verdict on the PFO charge; therefore, he is essentially arguing the circuit court should have *sua sponte* granted a directed verdict. However, Crow failed to demonstrate how this rises to the level of palpable error.

In support of his assertion, Crow suggests he does not fall within the five-year "look back" period required under the PFO statute, KRS 532.080(3)(c). This, he says, is a violation of his due process rights. More specifically, he posits the Commonwealth failed to prove, beyond a reasonable doubt, that he fell within the "look back" period because the effective discharge date on the "Notice of Discharge" is incorrect. As a result, Crow requests we reverse the circuit court's judgment and remand the case "so it can be determined if the notice of discharge from the DOC^[6] is correct." This argument is without merit.

At issue in this case was whether Crow completed service of his prior sentence on his previous felony charges within five years of when he committed

⁶ Department of Corrections.

the trafficking offense that serves as the basis of this case. KRS 532.080(3)(c)1. By way of proof, the Commonwealth introduced a certified copy of Crow's "Notice of Discharge" from the DOC which listed an effective date of May 22, 2012. When Officer Brewer was questioned about the meaning of the effective date, he said it meant Crow had been discharged because he had served his time. Crow opted not to introduce any contradictory testimony or evidence to refute this. Five years from May 22, 2012, would be May 22, 2017. Crow committed the trafficking offense at issue in the case *sub judice* on May 18, 2017. Therefore, the commission of the underlying offense was within the five-year "look back" period.⁷

Additionally, Crow suggests his first-degree PFO charge should have been a second-degree PFO charge, which would have required the court to grant a directed verdict *sua sponte*. Again, we disagree.

To be convicted as a first-degree PFO, the Commonwealth must prove the offender (1) was more than twenty-one years old and (2) was convicted of two or more felonies. KRS 532.080(3). For purposes of the PFO statute, a previous felony conviction is

⁷ Crow attempts to garner sympathy by pointing out, if we are to believe the effective date of the "Notice of Discharge," he was only four days shy of not meeting the statutory requirement. This is irrelevant. KRS 532.080(3)(c) does not differentiate between four years, four weeks, or four days. If Crow wished to dispute the effective date of the "Notice of Discharge" the time to have done so was at trial.

a conviction of a felony in this state or conviction of a crime in any other jurisdiction provided:

(a) That a sentence to a term of imprisonment of one (1) year or more or a sentence to death was imposed therefor; and

(b) That the offender was over the age of eighteen (18) years at the time the offense was committed; and

(c) That the offender:

1. Completed service of the sentence imposed on any of the previous felony convictions within five (5) years prior to the date of the commission of the felony for which he now stands convicted[.]

KRS 532.080(3).

At trial, the Commonwealth introduced evidence of three felony convictions for Crow, Boone County Circuit Court Nos. 03-CR-00434 and 09-CR-00513, and Kenton County Circuit Court No. 09-CR-00804. It was uncontested he was over twenty-one years old when he was convicted of these felonies. While it is true the 2009 convictions count as a single conviction pursuant to KRS 532.080(4), Crow could still be convicted as a first-degree PFO because of the 2003 conviction.

[T]he Commonwealth was required to prove [the offender] “[c]ompleted service of the sentence imposed on any of the previous felony convictions within five (5) years prior to the date of the commission of the felony for which he now stands convicted.” It is only required that completion of service of sentence or discharge from

probation or parole on any, not each, of the prior convictions shall have occurred within five years of the instant offense. *Howard v. Commonwealth*, 608 S.W.2d 62, 64 (Ky. App. 1980).

France v. Commonwealth, 320 S.W.3d 60, 64 (Ky. 2010). Moreover, for reasons set forth above, the Commonwealth proved at least one of the convictions occurred within the five-year “look back” period.

Because Crow’s due process rights were not violated by the circuit court’s decision not to grant a directed verdict *sua sponte*, we surmise no palpable error. *Wise*, 422 S.W.3d at 276.

As a final note, we feel it necessary to impress upon the circuit court, the Commonwealth, and defense counsel the importance of diligently following procedural rules during the penalty phase of the trial. In support of his second argument, Crow also mentioned the circuit court failed to instruct the jury to fix a sentence in the underlying trafficking charge. This is a procedural defect.

However, there was not a contemporaneous objection, and, as discussed above, Crow’s first-degree PFO conviction was lawful. Furthermore, there was no objection to the jury instruction, and when the circuit court asked the parties if they would combine the PFO with the sentencing the parties seemingly agreed to do so. Therefore, the defect is not subject to review. *Montgomery v. Commonwealth*, 320 S.W.3d 28, 49 (Ky. 2010).

For the foregoing reasons, we affirm the final judgment of the Lewis
Circuit Court.

ALL CONCUR.

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